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Letter dated 4 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council

Pursuant to my responsibilities as President of the International Criminal Tribunal for the Former Yugoslavia, I bring to your attention a report prepared by the Prosecutor pursuant to rule 7 bis of the Rules of Procedure and Evidence of the Tribunal (see annex, enclosure).

In that report, the Prosecutor complains of a consistent failure on the part of Serbia and Montenegro to comply with its obligations under article 29 of the Statute of the Tribunal and rule 39 of the Rules of Procedure and Evidence. It describes Serbia and Montenegro's present cooperation as nearly non-existent and states that the level of cooperation has declined following the December 2003 elections.

In particular, the Prosecutor identifies failures on the part of Serbia and Montenegro to execute arrest warrants issued by the Tribunal and to respond to requests made by the Registrar, pursuant to rule 59 of the Tribunal's Rules of Procedure and Evidence, to explain those failures. The Prosecutor also identifies failures on the part of Serbia and Montenegro to cooperate with the Prosecutor in her attempts to secure the testimony of witnesses and documentary evidence and to grant waivers to enable witnesses either to provide statements to the Office of the Prosecutor or to testify before the Tribunal.

I view the report of the Prosecutor as indicating extremely serious failures on the part of Serbia and Montenegro, and the Prosecutor has satisfied me that Serbia and Montenegro is failing to comply with its obligations under article 29 of the statute and rule 39 of the Rules of Procedure and Evidence. I also share the concern of the Prosecutor that such failures are detrimental to the expectations placed upon the Tribunal by its completion strategy and could seriously impinge on the Tribunal's ability to meet those expectations.

I would be most grateful if you could bring the report of the Prosecutor to the attention of the members of the Security Council.

(*Signed*) Theodor **Meron**

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Annex

Letter dated 29 April 2004 from the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia addressed to the President of the International Criminal Tribunal for the Former Yugoslavia

In accordance with rule 7 bis, I wish herewith to respectfully submit to you that Serbia and Montenegro consistently fails to comply with its obligation under article 29 of the statute of the Tribunal and rule 39 of the Rules of Procedure and Evidence. The attached report provides detailed information (see enclosure).

I would therefore kindly ask you to consider notifying the Security Council of Serbia and Montenegro's failure to comply.

(*Signed*) Carla **Del Ponte**
Prosecutor

Enclosure

Report to the President of the International Criminal Tribunal for the Former Yugoslavia regarding the non-compliance on the part of Serbia and Montenegro with its obligation to cooperate with the Tribunal

INTRODUCTION

1. I take this opportunity to draw the President's attention to the fact that the Union of Serbia and Montenegro has failed in several ways to meet its obligations under Article 29 of the Statute of the Tribunal, which I would now like to enumerate. I regret that this is not the first time that I have been compelled to bring to the attention of the President of this Tribunal the unacceptable state of co-operation by the Belgrade authorities, indeed it was as recently as September 2002 that I filed a similar report based solely on Belgrade's dismal performance in relation to the question of the apprehension of indicted fugitives.

2. At present Serbia and Montenegro's co-operation with the Office of the Prosecutor (OTP) can be described as nearly non existent in all main areas, but in particular in relation to (i) the apprehension and surrender of fugitives indicted by this Tribunal; (ii) receiving access to or copies of specific and relevant documents; and (iii) granting waivers to enable witnesses to either provide statements to the OTP or to testify before the Tribunal. This situation has been prevalent since the December 2003 Serbian parliamentary elections. Before those elections meaningful co-operation, however, remained insufficient and difficult throughout the year 2003. As a consequence, Belgrade's lack of co-operation may have a significant impact on ICTY's completion strategy and projected timeline for the completion of trials and investigations.

3. Co-operation has been severely affected by the political uncertainties and dramatic developments that followed the assassination of Prime Minister Zoran Djindjic on 12 March 2003. Upon the establishment of the new State Union of Serbia and Montenegro and its new leadership in February-March 2003, there have been some

positive developments (such as the amendment of the Law on Co-operation, with the abolition of the former Article 39, prohibiting the surrender of any accused indicted by the Tribunal after the passage of the Law). There was hope, and promises were made that the police actions that followed the Prime Minister's assassination would lead to the arrests of the remaining ICTY fugitives believed to be at large in Serbia. Unfortunately, no ICTY fugitives were amongst the approximately 10,000 persons arrested in the course of that police operation. At the request of the Belgrade authorities, I agreed to speed up the issuing of the indictment against two OTP suspects who were arrested during this operation, namely Franko Simatovic and Jovica Stanisic, so that they could be transferred rapidly to The Hague. The indictment against these accused was confirmed on 1 May 2003 and they were transferred to seat of the Tribunal on 30 May and 11 June respectively.

4. Until the Fall of 2003, key government officials in Belgrade were at least verbally expressing their political will to co-operate with the ICTY, even though such statements were often not associated with positive actions. When the new government took office on 3 March 2004, even the language of the new Serbian Government officials has changed significantly. The new leadership has stated publicly that co-operation with the Tribunal is not a priority, that there must be "two-way co-operation" and that there will be no co-operation in respect of cases based solely on command responsibility as understood by the Serb authorities. Moreover, the most senior officials have made unsubstantiated allegations about the impact of co-operation with ICTY on the country's stability. Such statements demonstrate a lack of willingness by the new authorities to co-operate fully or in good faith with the Tribunal. This has also been confirmed by their actions or lack thereof. After the change of government at State Union level, in April 2004, the new Minister of Foreign Affairs made some positive statements. Also, the Minister of Defence and the Serbian Minister of Interior met fugitives, apparently to try to convince them to surrender voluntarily to ICTY. No concrete results followed, however.

5. New obstacles and bureaucratic barriers have been created at the operational level in areas where previously a reasonable level of communication existed. Moreover,

despite several informal attempts, it has not been possible for my Office to establish any channel of communication at the higher levels. It is clear that on all major issues requiring the co-operation of the Serbian and Montenegrin authorities, such as the arrest and transfer of fugitives, the production of documents and ICTY access to witnesses, the Serb authorities would appear to have renounced the provision of more than a minimal level of co-operation with the ICTY.

APPREHENSION OF FUGITIVES

6. I would now like to address some of the major issues of non-co-operation, starting with the arrest and transfer of the indictees still at large.

7. In addition to the surrender of Franko Simatovic and Jovica Stanisic, mentioned above, the only arrests carried out by the Serb authorities in 2003 involved Miroslav Radic, who was surrendered on 17 May 2003 followed by the arrest of Veselin Sljivancanin who was apprehended in his apartment in Belgrade on 13 June 2003, one day before the deadline for the funding certification by the USA Government. He was surrendered to the Tribunal on 2 July 2003. Both of these accused had been high priority fugitives for many years. Since then, three other ICTY indictees were transferred to The Hague: Zeljko Meakic, who surrendered voluntarily on 4 July 2003, Mitar Rasevic, who also surrendered voluntarily on 15 August 2003, and Vladimir Kovacevic who was, as alleged by the Serb authorities, arrested and subsequently surrendered on 23 October 2003. In my opinion the Serb authorities are not entitled to any credit for the surrender of Meakic or Rasevic, since all arrangements that led to their surrender were made directly by the ICTY. Even in relation to Kovacevic, doubts remain regarding the exact circumstances of his alleged arrest. Indeed, on 15 March 2004, in the course of a Court proceeding before this Tribunal the accused stated that he had intended to surrender, but he had been prevented to do so by then Minister of Interior Mihajlovic. Therefore, it cannot be excluded that Kovacevic's surrender had been staged to score undue credit.

8. It is my belief, based on intelligence received in my Office, that out of 21 persons who have been indicted by this Tribunal and who have not been apprehended or

surrendered to The Hague, 15 of them either reside permanently in or travel frequently to Serbia and Montenegro. They include Radovan Karadzic and Ratko Mladic, who have been at large for almost nine years. They also include a number of accused charged for their role in the Srebrenica massacres in 1995. The fugitives also include General Vladimir Lazarevic, General Sreten Lukic and General Nebojsa Pavkovic, who were indicted in October 2003 and continue to this day to move freely in Belgrade. Six months before issuing this indictment I informed the Belgrade authorities that Steten Lukic was to be indicted so that steps could be taken to remove him from his official duties, yet despite this knowledge not only did they not remove him from office, but even they saw fit to decorate him. Further it could not be said that the location of these fugitives was unknown to the Belgrade authorities because both Lukic and Pavkovic were candidates in the December 2003 parliamentary elections. Sreten Lukic was dismissed from his position of Assistant Minister of Interior after the establishment of the new government in March 2004. This development, however, was not motivated by any willingness to co-operate with the ICTY, as the new government has failed so far to show any intention to hand over these well-known and high profile figures.

9. On no occasion has the current government of Serbia and Montenegro reported to the Registrar, pursuant to the requirements of Rule 59 of the Tribunal's Rules of Procedure and Evidence, regarding its inability to execute the arrest warrants that had been forwarded by the Tribunal. This failure is despite requests by the Registrar, the latest in April 2004, for such reports to be submitted. Rule 59(B) provides that "If within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly".

10. My Office has continuously shared information with the Serb authorities relating to the location of some of these fugitives in Serbia, so as to facilitate their arrest and transfer to The Hague. The information provided, however, did not result in any concrete results. Last month, for instance, my Office provided specific details about

the location and effective presence of an accused who had been indicted in respect of Srebrenica, yet the authorities refused to act on this information. On other occasions where my Office has shared information relating to the location of fugitives in Serbia, I have never received adequate feedback from the Serb authorities. In failing to apprehend the fugitives on Serbian soil and transfer them to The Hague, Serbia and Montenegro is in clear breach of its obligation to co-operate with the Tribunal. In my view these circumstances cannot be tolerated and it is easy to predict the negative impact this attitude and policy of the Serb authorities will have on the ability of the Tribunal to meet its targets under the Completion Strategy.

DIFFICULTIES OBTAINING EVIDENCE

11. I turn next to the difficulties I have experienced regarding the status of compliance by Serbia and Montenegro with its obligations to co-operate with my Office in respect of requests for assistance pursuant to Rule 39 of the Tribunal's Rules of Procedure and Evidence, in particular regarding my attempts to interview witnesses, gain access to relevant documents and obtaining witnesses to testify in proceedings before the Tribunal.

12. In relation to my efforts to secure witnesses testimonies, the willingness of States to co-operate with the Tribunal, particularly those of the former Yugoslavia, is critical to the success of the Tribunal's mandate. One particular obstacle confronting my Office in relation to securing the testimonies of witnesses from Serbia and Montenegro, is the requirement to obtain permission to conduct witness interviews, which often involves the service of summons to enable such interviews to take place. Even more critically and problematic is the need for potential witnesses to obtain from the Belgrade authorities, waivers or immunities to enable them to co-operate with the Tribunal without fear of domestic prosecution for revealing State secrets. While there has been some developments on locating witnesses[1] and suspects, and providing necessary waivers for witness testimony, and also in delivering Prosecutor's summonses and Court subpoenas, there are nevertheless still serious delays. Currently, over 50 such waivers are outstanding, some for more than a year.

[1] Especially in regard to the Serb victims and the KLA investigation.

13. There is a specific problem with these waivers when they concern high-level witnesses, such as Ministers or other senior military and political leaders. The majority of the 200 waivers granted so far relate to low level policemen or military officers. These matters were addressed in numerous discussions with Foreign Minister Svilanovic, yet despite promises, the situation has not improved. It has to be stressed that Serbia and Montenegro is the only State of the former Yugoslavia to have introduced such cumbersome procedures.

14. Intimidation of witnesses is becoming a more and more important problem in Serbia, and not only for cases related to ICTY. In the past three months, two protected witnesses in the Milosevic trial were threatened by members of the security services.

15. In addition to these difficulties in securing witnesses testimony, my Office experiences similar difficulties in gaining access to relevant documents. To date my Office has been given access to key documents only after protracted litigation. This has been the case in particular regarding documents that show the extent of influence and control of Slobodan Milosevic in the decision-making process regarding the wars in Bosnia and Herzegovina and Croatia.

16. My Office has been faced with obstacles concerning access to documents located in relevant archives and in this regard there has been a general attitude of obstruction. My Office has never received sufficient co-operation in gaining access to relevant documents or even obtaining an overview of the archival holdings that would enable me to make specific requests, instead of what would otherwise be interpreted as "fishing expeditions".

17. Another example of the problems that my Office encountered concerns access to documents relating to Mladic's official JNA file. After long delays and denials that the documents even existed, the Belgrade authorities eventually provided me with a copy of the file. However, this file does not contain any information relating to Mladic's activities after 1992. This leads me to wonder whether this is yet another

attempt to conceal the reality of Yugoslavia's involvement in the war in Bosnia and Herzegovina.

18. Although it is true that, over the years, Belgrade has produced several thousands documents to the ICTY, this has always been under pressure, and mainly as a result of binding orders. Even so, this does not say anything about the quality and relevance of the documents produced. Many highly relevant documents have not been produced. Others have been provided after unacceptable delays, thereby hampering on-going proceedings. Currently, there are over 120 requests for documents outstanding, which represents over 20% of all requests forwarded since 2001.

CONCLUSION

19. I would submit that the co-operation of Serbia and Montenegro with the Tribunal has been slow, partial and inadequate and has come as a result of international pressure Since December 2003, it has been at a standstill. It also appears unrealistic at this stage to expect any significant improvements on the basis of the public statements or actions by the high officials in government in Belgrade.

20. As a consequence, having particular regard to the United Nations Security Council Resolutions 1503 and 1534 and the expectations contained therein regarding the Tribunal's completion strategy, and the impact that the lack of co-operation in the part of Serbia and Montenegro is having on the Tribunal's ability to meet those expectations, I respectfully request you, pursuant to Rule 7 *bis*, to notify the United Nations Security Council of the failure on the part of Serbia and Montenegro to comply with its legal obligations to co-operate with the Tribunal in the above mentioned areas.

Carla Del Ponte
Prosecutor
April 2004.

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